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**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In The Matter Of

**Closed Captioning And Video Description
Of Video Programming**

**Implementation Of Section 305 Of The
Telecommunications Act Of 1996**

Video Programming Accessibility

DOCKET FILE COPY ORIGINAL

MM Docket No. 95-176

**COMMENTS OF GAME SHOW NETWORK, L.P.
ON PETITIONS FOR RECONSIDERATION**

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Dated: November 20, 1997

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SUMMARY

Congress intended its closed captioning requirements to achieve programming accessibility through reasonable requirements that would not decrease the amount of programming or the number of programming outlets overall. While in many respects the Commission's rules are consistent with this goal, the rules as adopted do not adequately accommodate the special circumstances faced by startup national networks. The Commission therefore should grant the petitions for reconsideration filed by Outdoor Life Network, Speedvision, the Golf Channel (collectively, "Outdoor Life"), and Encore Media Group ("Encore") which maintain an appropriate balance between accessibility and practicability. Conversely, the Commission should reject the petitions by Self Help for Hard of Hearing People, Inc. ("SHHH") and the National Association for the Deaf ("NAD"), which will only increase the burdens on national startup networks and result in less programming overall.

Game Show Network, L.P. ("GSN") therefore supports Outdoor Life's recommendation that the Commission revise its new network exemption. The current version of the new network exemption expires four years after a network's launch, regardless of its financial status. Yet most new networks remain unprofitable until reaching at least 20 million subscribers. A new network's exemption should be based on its financial health, not an arbitrary deadline.

Outdoor Life properly asks the Commission to toll its implementation schedule for the closed captioning of new programming to allow recently launched networks the same amount of time as their older counterparts. Without these changes, such networks will be forced to begin their captioning planning and spending while still within the new network exemption. Moreover, once their exemption expires, these startup networks will face the captioning rules at the current implementation stage.

The Commission should also grant Outdoor Life's request for a return to a percentage-of-programming implementation schedule for new programming, rather than the adopted method of requiring an absolute number of captioned programming hours each year over an eight-year period. The current rule will disproportionately burden new networks, which show relatively little new programming and rely instead on older shows.

GSN also urges the Commission to adopt Outdoor Life's request for a modification in the cap on captioning spending, currently set at 2 percent of a network's annual gross revenues. Because new national networks must raise large amounts of revenue simply to break even, the current cap could require such networks to spend hundreds of thousands of dollars on captioning even though the networks themselves are fighting to survive.

Encore Media Group ("Encore") properly seeks an exemption for pre-rule programming first exhibited prior to January 1, 1970. As Encore correctly observes, much older programming is not cost-effective to caption because of its limited commercial licensing value. If the Commission nonetheless requires captioning of such programming, it will probably not be aired at all because of the captioning costs. This would be completely inconsistent with Congress' intent in enacting the closed captioning requirements.

Finally, GSN opposes the petitions filed by Self Help for Hard of Hearing People, Inc. and the National Association for the Deaf. Both petitions seek the acceleration of the Commission's implementation schedule, the narrowing of its exemptions, and the tightening of its compliance requirements. The Commission should reject these petitions because they are inconsistent with Congress' intent in enacting the closed captioning statute, will unduly and unnecessarily burden the Commission and programmers with administrative requirements, and will ultimately lead to less programming overall, captioned and otherwise.

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Pursuant to Section 1.429 of the Commission's Rules, GAME SHOW NETWORK, L.P. ("GSN") by its attorneys hereby submits comments on certain petitions for reconsideration of the *Report and Order* in the above-captioned docket.

INTRODUCTION

Several parties, including GSN, have petitioned the Commission for reconsideration of its rules implementing Section 713 of the Communications Act.¹ Petitions filed by Outdoor Life Network, Speedvision, the Golf Channel and Encore Media Group echo the central point of GSN's petition for reconsideration -- that the current closed captioning requirements will inhibit the growth of new cable networks, ultimately resulting in fewer programming outlets and less captioned programming. This outcome would be completely inconsistent with Congress' intent behind Section 713.

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, § 305, 110 Stat. 6 (codified as amended at 47 U.S.C. § 713).

Other petitions have been submitted by advocates for the hearing-impaired who seek to expand the closed captioning requirements and accelerate their implementation. While GSN applauds the sentiments behind these petitions, it submits that their desired changes are inconsistent with Section 713 and would result in unnecessary financial hardship to new networks like GSN.

GSN therefore requests that the Commission reject the proposals for expansion or acceleration of the closed captioning requirements. GSN also reiterates that the Commission should revise its treatment of new networks and pre-rule programming to reflect the financial realities of startup cable networks. By making these revisions, the Commission will ensure that its rules encourage both captioning and competition.

I. THE COMMISSION SHOULD BROADEN THE EXEMPTIONS FOR NEW NETWORKS AND PRE-RULE PROGRAMMING.

A. The Commission Should Base The New Network Exemption On Subscriber Numbers And Toll The Exemption And Transition Periods For Existing New Networks.

The Commission currently exempts new networks from closed captioning requirements for their first four years of operation because of the "significant start-up costs" facing new networks and the fact that "additional costs of captioning could pose an economic burden that might deter entry by some networks." Report and Order ¶ 154, FCC 97-279, MM Docket No. 95-176 (rel. Aug. 22, 1997), 62 Fed. Reg. 48,487 (Sept. 16, 1997) ("*Report and Order*"). As GSN stated in its Petition for Reconsideration, however, the new network exemption should be based on the financial status of the networks and should remain in effect until the network reaches 20 million subscribers. GSN Petition at 5-8. Accordingly, GSN supports the Petition for Reconsideration filed by Outdoor Life Network, L.L.C., Speedvision Network, L.L.C., and The Golf Channel ("Outdoor Life"), which states:

The 20 million subscriber threshold represents the *earliest* point at which most national basic cable networks can reasonably begin to shoulder the economic burden of closed captioning (*i.e.*, the point at which they begin to turn the corner to economic viability). Petitioners continue to believe that this standard is the most appropriate proxy to determine whether a network can realistically manage to begin captioning some portion of its programming.

-- Outdoor Life Petition for Reconsideration at 4.

GSN also supports Outdoor Life's recommendation that the Commission amend its rules to begin the exemption period with the effective date of the closed captioning rules, rather than a network's launch date. Outdoor Life Petition at 6-9. *See also* GSN Petition at 9-10. Many existing startup networks made substantial investments in acquiring programming before there was any indication that Section 713 would be enacted. They therefore sought the new network exemption to provide them with time to adjust to the captioning requirements. But the new network exemption currently provides absolutely no relief for any network launched in or before 1996.

Networks already in existence will have only one year in which they will not be subject to the Commission's captioning requirements. As Outdoor Life points out, even during their "exemption period," these networks will have to purchase captioning equipment and contract for captioning services in anticipation of becoming subject to the captioning requirements. Outdoor Life Petition at 7-8. As it currently stands, therefore, the Commission's new network exemption will be almost worthless to these emerging networks. The Commission should revise its new network exemption to start with the effective date of the closed captioning regulations.

GSN also agrees with Outdoor Life's assertion that this revision should be accompanied by another change: new networks should receive the same eight-year transition given to their older counterparts before becoming subject to the Commission's final captioning requirements. Outdoor Life Petition at 14. The Commission's rules currently require new networks to "drop

in" to whatever captioning requirements exist at the time their exemption expires. Thus, a network whose exemption expires in 2002 will immediately be expected to caption 900 hours of new programming per quarter.

As noted above, however, without a transition period, new networks must begin planning their captioning efforts during their exemption, as they purchase captioning equipment and contract for captioning services. Thus, unless the Commission tolls the transition period for emerging networks like GSN and other recently launched networks, the Commission's captioning requirements will substantially and disproportionately harm these networks. *See Outdoor Life Petition at 12-14.*

B. The Implementation Schedule For Captioning Of New Programming Disproportionately Burdens Startup Networks That Rely Heavily On Pre-Rule Programming.

The Commission failed to explain its shift from a percentage-based implementation schedule for its new programming rules to a schedule requiring an absolute number of captioned programming hours. *Outdoor Life Petition at 10-11. See also GSN Petition at 12 n.7.* *Outdoor Life* correctly observes that this change will disproportionately increase the captioning burden on networks – like GSN, *Outdoor Life*, *Speedvision*, and the *Golf Channel* -- that rely heavily on pre-rule programming.

Since such networks produce proportionately less new programming, an absolute-number-based implementation schedule will require them to caption virtually all their new programming. This is an unfair result and discourages startup networks from producing new programs – a result contrary to the express intent of the Commission. *See Report and Order* ¶ 154 (“We do not intend our closed captioning requirements to inhibit new sources of video programming due to our interest in fostering diversity in video programming.”). GSN supports

Outdoor Life's request for a return to a percentage-based implementation schedule for the Commission's requirements for new programming.

C. The Cap On Captioning Spending Does Not Reflect The Financial Realities Of A Startup National Cable Network.

Outdoor Life echoes GSN's request to revise the Commission rule whereby a network is not required to spend more than an amount equal to two percent of its gross revenues from the previous calendar year on captioning expenses. Outdoor Life Petition at 11-12. *See also* GSN Petition at 12 n.7. As Outdoor Life states in its Petition, national basic cable networks require large amounts of revenue before earning a profit. *Id.* at 11. Thus, even for networks that have yet to break even, captioning costs are unlikely to exceed the two percent expense cap. Captioning costs nevertheless will be substantial, diverting hundreds of thousands of dollars in scarce resources away from start-up related costs and threatening the survival of these recently launched national networks. GSN therefore joins with Outdoor Life in recommending that the Commission lower its spending cap in light of the high costs of starting a new national network.

D. The Commission Should Expand Its Exemption For Certain Pre-Rule Programming.

GSN supports the recommendation by Encore Media Group ("Encore") for an exemption for pre-rule programming first exhibited prior to January 1, 1970. Encore Petition for Reconsideration at 5-9. Like certain of Encore's programming services and many other emerging national cable networks, GSN relies heavily on pre-rule programming. GSN Petition at 15. As Encore states in its Petition, however, much of this programming is not cost-effective to caption because of its limited commercial licensing value. Encore Petition at 5-6. Accordingly, if this programming is subject to the Commission's captioning requirements, it may not be aired at all because no entity will find it worthwhile to pay for the captioning costs. This

result is completely opposite of Congress' intent in enacting Section 713. *See, e.g.*, House Report at 114 ("[T]he Committee does not intend that the requirement for captioning should result in previously produced programming [sic] not being aired due to the costs of the captions."); Encore Petition at 6-7.

II. THE COMMISSION SHOULD PROVIDE ALL PROGRAMMERS WITH TWO YEARS BEFORE THE CAPTIONING REQUIREMENT FOR NEW PROGRAMMING GOES INTO EFFECT AND SHOULD GRADUALLY PHASE-IN ITS REQUIREMENTS FOR PRE-RULE PROGRAMMING.

A. The Commission Should Reject Requests To Accelerate The Implementation Of Its Requirements For New Programming.

Under the current closed captioning rules, captioning of new programming must begin in the year 2000. *Report and Order* ¶ 44. The petition for reconsideration filed by Self Help for Hard of Hearing People, Inc. ("SHHH"), however, urges the Commission to accelerate its phase-in of captioning more quickly and require video programmers to caption 1000 hours of new programming in 1999. SHHH Petition for Reconsideration at 2-5. In support of its petition, SHHH refers to the two-year period between the effective date of the regulations and the start of captioning as a two-year "free ride." *Id.* at 4. SHHH also argues that any delay in requiring captioning will hinder the development of captioning resources because companies will not hire captioners until this two-year period ends. *Id.* According to SHHH, because programmers will delay in captioning their programming until the last minute, the pool of captioners will not grow, and prices for captioning will not decline.

But SHHH provides no evidence in support of its predictions. Nor does Section 713 or its legislative history bar or limit a transition period for the closed captioning requirements. Moreover, the Commission already rejected similar arguments in its *Report and Order*. The Commission acknowledged that its goal was to "make all new video programming fully

accessible as soon as possible.” *Id.* ¶ 41. However, the Commission noted that because of the limited supply of captioning resources, imposing its rules more quickly could drive captioning costs much higher, forcing programmers to cut back on new programming and creating problems with long-term contracts that do not address responsibility for captioning. *Id.* The current rules therefore strike a balance between avoiding unduly burdening video programmers and maximizing accessibility of new video programming.

Contrary to SHHH’s assertions, this transition period will lower or keep captioning prices flat, as the supply of captioning resources builds in anticipation of the Commission’s requirements and programmers caption programs to be aired after 2000. A two-year transition period – tolled for networks covered by the new network exemption -- should provide adequate time for networks to review the captioning requirements and begin compliance.

B. The Commission Should Allow New Networks The Same Transition Period As Older Networks.

SHHH similarly argues that the Commission should revise its new network exemption to begin its captioning requirements one year after a network loses its exempted status.² SHHH Petition at 5. As GSN states in its Petition for Reconsideration, new networks, upon emerging from the new network exemption, should not face the Commission’s rules as they stand at the

² While GSN certainly supports a transition period before new networks become subject to the closed captioning requirements, it has been unable to determine the source for SHHH’s belief that the Commission has granted such a transition period. SHHH also alleges that the Commission’s rules make networks exempt from captioning requirements for their first four years of operations or until they reach \$75 million in yearly revenue, upon which they become subject to the Commission’s requirements over the same transition period given other networks. SHHH Petition at 5. Although GSN supports providing new networks with an **eight-year** transition period and linking the new network exemption to network revenue (*see supra* at 2-4), it has been unable to find any language in the Commission’s rules supporting SHHH’s \$75 million figure.

time. *See* GSN Petition at 10-13. Instead, fairness dictates that new networks should receive the same amount of transition time as their older counterparts – two years. *Id.*

Without such a transition period, new networks will be forced to caption their programming at the existing level immediately. By allowing new networks the same amount of transition time as older networks, the Commission will allow these emerging networks sufficient time after emerging from startup status to prepare for the additional costs of captioning. *See* GSN Petition at 13.

C. The Commission Should Only Require Networks To Caption Two Percent Of Their Pre-Rule Programming Per Year After 2000.

GSN agrees to some extent with the request for gradual implementation of the Commission's requirements for pre-rule programming made by the petition for reconsideration submitted by the National Association of the Deaf ("NAD") and the Consumer Action Network.³ NAD argues that the Commission should establish unspecified benchmarks between 1998 and 2008 for captioning of pre-rule programming. NAD Petition at 23-24. GSN does not agree with all aspects of NAD's proposal regarding pre-rule programming, *see infra* at 9-14, and has instead proposed more reasonable benchmarks for the gradual implementation of the Commission's requirements, *i.e.*, a phase-in of captioning requirements for pre-rule programming of two percent per year, beginning in 2000, and the captioning of "significantly viewed" programming. *See* GSN Petition at 16.

³ SHHH states that it supports the arguments made in the NAD petition. SHHH Petition at 2.

III. THE COMMISSION SHOULD NOT EXPAND ITS CAPTIONING REQUIREMENTS.

A. The Commission Appropriately Exempted Five Percent Of New Programming From Its Captioning Requirements.

GSN opposes several changes recommended by NAD to the Commission's closed captioning rules. First, NAD urges the repeal or narrowing of the Commission's exemption of five percent of new programming from captioning requirements. *Report and Order* ¶ 43. According to NAD, which refers to this exemption as a *de minimus* exception, the Commission has no authority under Section 713 to exempt *any* new programming from its captioning requirements other than through the explicit exemptions established by Congress: (1) where the captioning requirement is economically burdensome; (2) where the captioning requirement is inconsistent with contractual obligations; and (3) where the captioning requirement imposes an undue burden. NAD Petition at 3 (citing 47 U.S.C. § 713(d)).

Section 713 requires the Commission to adopt rules ensuring that new video programming "is fully accessible through the provision of closed captions." 47 U.S.C. § 713(b). The phrase "fully accessible" is not defined anywhere in the statute or legislative history. However, as the Commission noted, requiring captioning of 100 percent of eligible programming would create enormous administrative problems for programmers and the Commission with last-minute exemption requests and complaints regarding inadvertent errors. *Report and Order* ¶ 43. Such a result would be plainly inconsistent with Congress' intent that the Commission balance the need for closed caption programming against the potential for hindering the production and distribution of programming. H.R. Report 104-204, 104th Cong., 1st Sess. ("House Report") (1995) at 114.

It is well-established that the Commission must interpret statutes to avoid results that are absurd or plainly inconsistent with the policy of the legislation as a whole. *See Declaratory*

Ruling and Notice of Proposed Rulemaking, *Guam Public Utilities Commission for Petition for Declaratory Ruling Concerning Sections 3(37) and 251(h) of the Communications Act; Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act*, 12 FCC Rcd 6925, nn.80-82 (rel. May 19, 1997) (citing cases). Noting that the legislative history states only that "most new programming will be closed captioned," *Report and Order* ¶ 43, the Commission has properly granted programmers a small amount of leeway to accommodate special circumstances where pre-distribution approval may be impossible.⁴

B. The Commission Should Not Narrow Its Exemption For Late-Night Programming.

GSN also opposes NAD's challenge to the Commission's exception for late-night programming. In its *Report and Order*, the Commission exempted programming between 2 a.m. and 6 a.m. from its closed captioning requirements. *Report and Order* ¶ 156. The Commission also allowed video programmers that distribute services viewed in more than one time zone at the same time to avoid closed captioning during any continuous four-hour time period between 12 a.m. and 7 a.m. local time in any location where that service is intended to be viewed. *Id.* NAD asserts that these exemptions are too broad and will allow programmers to avoid captioning during time periods when many hearing-impaired persons are in the viewing audience. NAD Petition at 10-11.

The Commission should reject NAD's petition for reconsideration of the late-night exemption. As an initial matter, much of the programming distributed during the exempted

⁴ Indeed, NAD itself appears to recognize the impracticability of a 100 percent captioning requirement by suggesting exempting 0.5 percent of new programming. See NAD Petition at 5 n.4.

period will already be captioned. *Report and Order* ¶ 155. Moreover, the Commission reasonably determined that “the costs of captioning late night programs outweigh the benefits to be derived from captioning such programming at this time.” *Id.* As the Commission observed, “[p]rogramming distributed in the middle of the night typically has a very limited audience and receives limited revenues. Indeed for much of the history of television broadcasting, the late night hours were not occupied with programming at all due to the costs of producing and distributing programming for such a limited audience.” *Id.*

The Commission created the four-hour block exemption for programming between 12 a.m. and 7 a.m. in recognition of the special circumstances of programmers that provide programs across time zones. *Id.* ¶156. Without this exception, programmers will be forced to caption programming that would otherwise be exempt if it were aired only in one time zone. The four-hour block exemption thus allows such programmers to take advantage of the same late-night exemption given to other programmers. *Id.* The Commission should not revise its late-night programming exemption.

C. The Undue Burden Exemption Should Not Be Narrowed.

The Commission should also reject NAD’s request to narrow the undue burden exemption provided in Section 713(d)(3). NAD Petition at 17-18. Specifically, NAD urges that the Commission require programmers to caption while their undue burden request is pending and limit the duration of any undue burden exemptions. *Id.*

But requiring programmers to caption while their undue burden exemption request is pending contradicts the purpose of the exemption itself. The undue burden exemption is intended to protect networks for which captioning will constitute a significant financial or technical burden. *Report and Order* ¶ 198. Forcing such networks to caption their programming

during the potentially lengthy period in which their petition is reviewed will result in the very harm the undue burden exemption was intended to avoid – needlessly imposing captioning costs on those entities least likely to afford them.

A general time limit on undue burden exemptions will similarly harm startup programmers by forcing them to resubmit applications for exemption unnecessarily. The Commission properly rejected such a time limit on exemptions, finding that “it is better to maintain the flexibility to limit the duration of an undue burden exemption if the facts before us indicate that the particular circumstances of the petition warrant a limited exemption.” *Id.* ¶ 205.

D. Additional Compliance Requirements Will Unnecessarily And Unfairly Burden Video Programmers.

Finally, NAD requests that the Commission require programmers to keep specific compliance records, eliminate the requirement that consumers contact the relevant programmer before complaining to the Commission, and shorten the time period that providers have to respond to complaints. NAD Petition at 19-23. The Commission correctly addressed these issues in its *Report and Order*. Regarding a recordkeeping requirement, the Commission properly found that such a requirement would be unnecessarily burdensome for programmers, particularly small businesses. *Report and Order* ¶¶ 240, 243. Accordingly, the Commission simply required programmers to keep some form of records sufficient to demonstrate their compliance with the closed captioning requirements. *Id.* ¶ 243.

The Commission also appropriately required complainants to contact video programmers before complaining to the Commission. *Id.* ¶¶ 240, 242. Allowing complaints to go directly to the Commission would be unfair to programmers, delay resolution of the complaints, and unnecessarily burden the Commission with disputes that might be easily resolved.

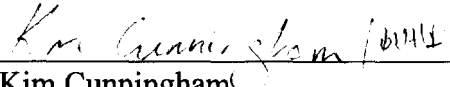
Similarly, the Commission properly granted programmers 45 days to resolve complaints. *Id.* at 243. This period will allow programmers adequate time to review and investigate the complaint, contact the complainant, and negotiate an acceptable resolution. A shorter time period would be insufficient.

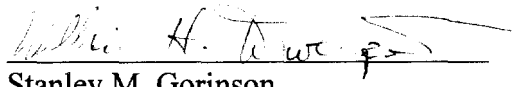
CONCLUSION

For the foregoing reasons, GSN urges the Commission to grant the petitions for reconsideration filed by Outdoor Life, Speedvision, the Golf Channel and Encore Media Group and to deny the petitions for reconsideration filed by SHHH and NAD.

Respectfully submitted,

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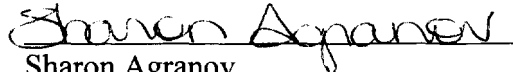

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Dated: November 20, 1997

CERTIFICATE OF SERVICE

I, Sharon Agranov, do hereby certify that copies of the Comments of Game Show Network, L.P. on the Petitions for Reconsideration has been served on the parties listed below via hand delivery unless otherwise indicated on this 20th day of November, 1997.


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